Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1144

W. EARL DUNCAN,
JAMES R. DUNCAN,
HOYT P. PIVER,
and AVERY A. PIVER,

Petitioners,

v.

FURROW AUCTION COMPANY,
ADVANCEMENT, INC.,
GLENN PENNINGER,
and SMALL BUSINESS ADMINISTRATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Page

OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES. 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 18

APPENDIX A:

- Opinion of United States Court of Appeals for the Fourth Circuit, dated 10/20/77 . . . . . 1a
- Order of the United States Court of Appeals for the Fourth Circuit, dated 11/15/77 . . . . . 5a

APPENDIX B:

- Order of United States District for the Eastern District of North Carolina, Wilmington Division, dated 2/27/76 . . . . . 6a
- Order of United States District for the Eastern District of North Carolina, Wilmington Division, dated 3/10/76 . . . . . 9a

TABLE OF AUTHORITIES

Court Decisions:

Capital Refrigeration, Inc. v. United States, 375 F. Supp. 462 (D. Pa. 1973) 12

Fulp v. Fulp, 264 N.C. 20, 140 S.E.2d 708 (1965) 18

Mark v. Groff, 521 F.2d 1376 (9th Cir. 1975) 13, 14

Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974) 15

Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) 13, 14, 16

States Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974) 16

	Page
Statues:	
Section 25-3-603(2), General Statutes of North Carolina	4, 12
Act of July 18, 1958, Section 2[5], 72 Stat. 385, 15 U.S.C. Section 634(b)(1)	2, 3-4, 9-10, 11, 13, 17
Act of July 18, 1958, Section 2[5], 72 Stat. 385, 15 U.S.C. Section 634(b)(2)	2, 3, 4, 11, 12, 13
28 U.S.C. Section 1346 et seq.	17
Constitutional Provisions:	
Fifth Amendment of the Constitution of the United States	3, 9, 11

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on October 20, 1977 and the order denying rehearing entered on November 15, 1977.

OPINIONS BELOW

The opinion (order) of the United States District Court for the Eastern District of North Carolina dated February 27, 1976 is unreported and is reprinted in Appendix B hereto. The order of the trial court denying a stay pending appeal is unreported and is reprinted in Appendix B hereto.

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported and is reprinted in Appendix A hereto. The order of the Court of Appeals denying rehearing is not reported and is reprinted in Appendix A hereto.

JURISDICTION

This Court's jurisdiction in the present case is founded upon 28 U.S.C. § 1524 (1) which gives this court authority to review, by writ of certiorari, the judgment of a United States Court of Appeals in a civil case.

The judgment in this case of the United States Court of Appeals for the Fourth Circuit was filed on October 20, 1977. A timely filed petition for rehearing or rehearing *en banc* was denied by the Court of Appeals by its order filed on November 15, 1977.

QUESTIONS PRESENTED

1. Whether the failure of the courts below to read the two subparts of Title 15, U.S.C. § 634 (b) together misconstrued the statute resulting in a taking of petitioners' property without due process of law and a taking of private property without just compensation pursuant to the Fifth Amendment of the Constitution of the United States.

2. Whether a temporary restraining order and a preliminary injunction are authorized against an employee of

the Federal government in his individual capacity when said employee acts outside the scope of his authority and in bad faith and unreasonably.

3. Whether under the facts of this case the Administrator of the Small Business Administration or his property was enjoined.

CONSTITUTIONAL PROVISIONS AND STATUTES

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 15 U.S.C. §634(b)(1) and (2)

Title 15, U.S.C. § 634 (b)(1) and (2) deal with the powers of the Administrator of the Small Business Administration, and in pertinent parts reads as follows:

> (b) in the performance of, and with respect to, the functions, powers and duties vested in him by this Act the Administrator may –
>
> > (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States District Court, . . . but no . . . injunction . . . or

other similar process, mense or final, shall be issued against the Administrator or his property.

(2) Under regulations prescribed by him, assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as the Administrator shall determine to be reasonable, any evidence of debt, contract, claim, personal property or security assigned to or held by him in connection with the payment of loans granted under this Act. . . .

GENERAL STATUTES OF NORTH CAROLINA, § 25-3-603(2)

(2) Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee;

STATEMENT OF THE CASE

The instant case is an appeal from an order entered by the Honorable F.T. Dupree, Jr., United States District Judge, on February 27, 1976 dissolving plaintiffs' temporary restraining order, denying plaintiffs' Motion for a Preliminary Injunction, dismissing plaintiffs' Complaint as to defendant Glenn Penninger and intervenor Small Business Administration and remanding said action to the Superior Court for Columbus County, North Carolina. The order is not reported and appears in Appendix B.

Plaintiffs' also requested a stay of the trial court's order dissolving the temporary restraining order; the order denying that relief dated March 10, 1976 is not reported and appears in Appendix B.

The case was commenced on January 29, 1976 as an action in the Superior Court for Columbus County,

North Carolina seeking a temporary restraining order, preliminary and final injunctions restraining two (2) foreclosure sales of the assets of Auto-Vac Company, Inc. against the auctioneer (Furrow Auction Company), a note holder (Advancement, Inc.) and Glenn Penninger (the agent or employee of the other note holder Small Business Administration).

The complaint alleged in substance that: (1) the plaintiffs were the holders of 80 per cent, i.e., 4/5ths of the capital stock of Auto Vac Company, Inc., (2) that the defendant Advancement, Inc. and the Small Business Administration were in the process of selling certain assets of Auto Vac Company, Inc. pursuant to two (2) Notices of Public Foreclosure Sales, (3) that the defendant Glenn Penninger was the agent or employee of the Small Business Administration supervising the sale, (4) that the plaintiffs prior to sale time owned 100 per cent of the capital stock of Columbus Developers, Inc. which corporation caused the following cashier's checks to be issued by Southern National Bank and tendered to the defendants in full payment of and in exchange for an assignment of the respective notes, deeds of trust and/or collateral:

Date	Number	Payee	Amount
1/29/76	30736	Small Business Administration	$60,409.07
1/29/76	30739	Advancement, Inc.	22,289.70
1/29/76	30740	Advancement, Inc.	22,289.70

(5) that the defendants refused to accept those cashier's checks even though plaintiffs were led to believe by the defendant Glenn Penninger on behalf of the Small Business Administration and by Richard Wallace on behalf of defendant Advancement, Inc. that the checks would be accepted, (6) that defendants had commenced the fore-

closure sale, (7) that time was of the essence, (8) that plaintiffs had no speedy and adequate legal remedy.

Upon the posting of a $30,000.00 bond, the Superior Court for Columbus County issued its Order to Show Cause and Temporary Restraining order restraining defendants' and all persons in active concert and participation with them from transferring, selling, delivering and disposing of any of the personal property of Auto Vac Company, Inc. whether at auction or otherwise pending a hearing to be held on February 5, 1976.

The Order to Show Cause and Temporary Restraining Order, summons and complaint were served on the defendant Furrow Auction Company; these items were not and have not been served on the defendants Advancement, Inc. and Glenn Penninger.

However, on February 2, 1976 the defendant Glenn Penninger filed a Petition for Removal to the Wilmington, North Carolina federal court stating that at the time and place of the occurrences giving rise to the allegations of the Complaint, he was an employee of the Small Business Administration, serving in his official capacity, and was acting under color of his office, status, right, title and authority under the United States laws affecting the Small Business Administration. The Petition for Removal alleged jurisdiction of the federal district court under Title 28, U.S.C. § 1442(a)(1).

On February 5, 1976 the Small Business Administration moved to intervene and filed its Answer alleging in substance that the cashier's check for $60,409.07 was tendered to the Small Business Administration approximately five minutes prior to the sale by the plaintiffs for an assignment of the Deed of Trust, admitting that it refused to accept the check described in the Complaint, and

defending upon the ground of sovereign immunity under 15 U.S.C. § 634 (b).

The District Judge signed an Order dated February 3, 1976 authorizing the United States Marshall to seize all of the undelivered personal property belonging to Auto Vac Company, Inc. still located on the premises where the auctions had been held on January 29, 1976, and in effect returning those items to the control of the Small Business Administration.

Finally on February 17, 1976, a hearing was held on the Small Business Administration's Motion to Dismiss and Motion to Vacate Temporary Restraining Order, and on plaintiffs' Motion for Preliminary Injunction.

In support of plaintiffs' Motion a detailed Affidavit was filed signed by one of the plaintiffs W. Earl Duncan. The Small Business Administration failed to file any affidavit, and no testimony from any witness was taken at the hearing before the District Judge. Mr. Duncan's Affidavit states:

(a) The named plaintiffs own 80 per cent of the capital stock of Auto Vac Company, Inc.

(b) That the intervenor Small Business Administration and defendant Advancement, Inc. informed the plaintiffs prior to January 29, 1976 that they would foreclose certain Deeds of Trust and/or Security Agreements at a public foreclosure sale on January 29, 1976.

(c) That the defendant Furrow Auction Company was hired to act as auctioneer by both the Small Business Administration and by Advancement, Inc.

(d) That the plaintiffs were in touch with Glenn Penninger who was supervising the sale for the Small Business Administration, with Richard Wallace who was supervising the sale for Advancement, Inc. and with Sam Furrow

and other agents of the Furrow Auction Company on January 28, 1976.

(e) That on January 28, 1976 Glenn Penninger, Richard Wallace and agents of the Auction Company agreed to assign the Deeds of Trust, Security Agreements and/or collateral to Columbus Developers, Inc. upon the payment of $60,409.07 to the Small Business Administration and of $44,579.40 to Advancement, Inc.

(f) These figures were obtained from Glenn Penninger, Richard Wallace, and the agent of Furrow Action Company.

(g) That the assignment was to be pursuant to Section 25-3-603 (2) of the General Statutes of North Carolina [previously set forth herein].

(h) That the cashier's checks [previously set forth herein] were issued to the plaintiffs pursuant to such agreement by Southern National Bank.

(i) That the cashier's checks [set forth previously herein] were tendered to the defendants on the morning of January 29, 1976 pursuant to the agreement between the parties.

(j) That the defendants either negligently or arbitrarily, maliciously and intentionally refused to accept the cashier's checks.

(k) That upon information and belief the sale resulted in approximately $34,000.00 to the Small Business Administration and $18,000.00 to Advancement, Inc.

(l) That affiant has not had access to the building, in which the equipment was retained pursuant to the temporary restraining order, since the date of the sale – said access being strictly with Furrow Auction Company, the Small Business Administration and U.S. Marshals pursuant

to the Court order of February [3], 1976, and has not made an inventory. However, upon information and belief, the bulk of the items remaining are those items on which only Advancement, Inc. had a security agreement.

(m) That only Furrow Auction Company, and not Advancement, Inc. or Glenn Penninger, was served with the temporary restraining order.

(n) That the plaintiffs intend to file an Amended Complaint against the defendants to require the setting aside of the foreclosure sale and for conversion of Auto Vac's property.

(o) That unless the temporary restraining order is continued, the plaintiffs will suffer great and irreparable damage in that delivery of the property remaining will effectively put Auto Vac out of business, and will deprive plaintiffs of the right to proceed after other collateral held by the endorsers of the Deeds of Trust and/or Security Agreements.

(p) That the acts of the defendants have worked and will work a taking of the plaintiffs' property without due process of law and a taking of private property without just compensation pursuant to the Fifth Amendment of the Constitution of the United States.

No other operative fact was before the District Court Judge as a result of affidavit or testimony. Plaintiffs' Motion to Stay Pending Appeal was filed on March 9, 1976 at 4:30 P.M. in an attempt to stop distribution of Auto Vac Company, Inc.'s equipment on or about March 10, 1976.

In the instant case the trial court concluded as a matter of law that the service of the temporary restraining order on the auction company was in essence enjoining the Small Business Administration in violation of Title 15,

U.S.C., Section 634 (b) (1). The trial court made such a determination based upon the express findings that " . . . *the property belonging to the Small Business Administration for purposes of the sale was affected by the temporary restraining order* . . . " [emphasis supplied], and that "the guarantor, not a party to this suit, put up $60,000.00 to cover any deficiency after the sale." (See the order dated February 27, 1976 in Appendix B hereto).

The Court of Appeals affirmed the lower court finding as follows in its opinion decided October 20, 1977:

> . . . We express no opinion on the correctness of plaintiffs proposed construction of the statute except to say that nothing required the Administrator to accept plaintiff's offer to purchase the notes rather than to proceed with the foreclosure. *Nothing indicates that this was unreasonable.* Since there is nothing to show that the Administrator acted unreasonably, we will not speculate on what might be the result if he did [emphasis supplied].

REASONS FOR GRANTING THE WRIT

The courts below have decided an important question in the administration of the loan provisions supervised by the Small Business Administration of the federal government which has not been, but should be, settled by this court. The Small Business Administration has numerous contacts with small businessmen, and makes numerous loans to small businessmen and has done such since it has been in existence. The public, and especially these small businessmen, place exceptional importance on knowing how to properly deal with federal government officials and in knowing the extent of actions of government officials that will be condoned by the courts.

It is petitioners' contention that the failure of the courts below to read the two subparts of Title 15, U.S.C. § 634 (b) together misconstrued the statute and resulted in a taking of the plaintiffs' property without due process of law and a taking of private property without just compensation pursuant to the Fifth Amendment of the Constitution of the United States.

Petitioners Fifth Amendment claim was properly before the lower courts being set forth in paragraph (p) of petitioner W. Earl Duncan's affidavit set forth in full in the Statement of the Case set forth herein, *ante*.

Title 15, U.S.C. § 634 (b) (1) and (2) deal with the powers of the Administrator of the Small Business Administration, and in pertinent parts read as follows:

> (b) In the performance of, and with respect to, the functions, powers and duties vested in him by this Act the Administrator may –
>
> (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United District Court, . . . but no . . . injunction . . . or other similar process, mense or final, shall be issued against the Administrator or his property.
>
> (2) under regulations prescribed by him, assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as the Administrator shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in connection with the payment of loans granted under this Act . . . .

It is plaintiffs' contention that the two (2) subsections set forth above must be construed together, i.e., that the

duty rests on the Administrator to act *reasonably* in selling or assigning any security assigned to him in connection with the payment of loans granted under the Act (subsection (b) (2), and that in the absence of such reasonable actions the Administrator may be enjoined, compare, *Capital Refrigeration, Inc. v. United States*, 375 F. Supp. 462 (D. Pa., 1973) (Equity jurisdiction may attach where it is shown that the Administrator has exceeded his authority). The uncontroverted evidence in this case presented in the Statement of the Case herein, *ante* shows that the defendant Glenn Penninger acting as the employee or agent of the Small Business Administrator agreed to assign the Deed of Trust, Security Agreement and/or Collateral to Columbus Developers, Inc. [a corporation owned wholly by the plaintiffs] upon payment of $60,409.07 to the Small Business Administration; that the aforementioned agreement was entered into on January 28, 1976; that the payoff figure was obtained from the same Glenn Penninger; that the Administrator had power to make said assignment pursuant to Title U.S.C. § 634 (b) (2) set forth, *ante*; that the assignment was to be pursuant to Section 25-3-603(2) of the General Statutes of North Carolina which reads:

> (2) Payment or satisfaction may be made with the consent of the holder by any person including a stranger to the instrument. Surrender of the instrument to such a person gives him the rights of a transferee;

that the following morning a cashier's check was issued by Southern National Bank and tendered to Glenn Penninger prior to the sale; that the cashier's check was payable to the Small Business Administration on behalf of Columbus Developers, Inc. in the amount of $60,409.07; that Glenn Penninger refused to accept said check even

though the plaintiffs were led to believe by Glenn Penninger on behalf of the Small Business Administration that the check would be accepted; that the foreclosure sale was conducted bringing the Small Business Administration the sum of approximately $34,000.00, i.e., some $26,000.00 short, and depriving the plaintiffs of substantial property rights. It is contended that under no reading of the statute, i.e., 15 U.S.C. § 634 (b) (2) could the Administrator, through his employer or agent Glenn Penninger, be said to be acting reasonably as Congress required. Therefore, assuming *arguendo* that service of the temporary restraining order on the Auction Company is enjoining the Administrator which is denied *post* herein, it is asserted that the Administrator had not followed the Congressional Mandate to act *reasonably*, and that therefore reading subsection (b) (1) and (b) (2) of the statute together that the Administrator could be enjoined under the facts of this case.

It is petitioner's second contention that the lower courts' decisions are in conflict with the principle of, i.e., the spirit of, this court's decision in *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed 2d 90 (1974) authorizing suits, individually, against government employees who act outside the scope of their authority.

Suit is authorized against an employee of the government when said employee acts outside the scope of his scope of authority, see, *Mark v. Groff*, 521 F. 2d 1376 (9th Circ. 1975) wherein it was held that IRS agents have no absolute immunity from suits for damages when they act outside the scope of their authority. The California District Court dismissed plaintiff's Complaint for damages and injunctive relief. The plaintiff charged that the agents acted maliciously and intentionally to bring about the ruination of his tax return business by making false re-

marks about him to his clients, by arresting him unlawfully, by having high bail set, by auditing most of the returns he had prepared, and by warning his clients that they would be audited if they did not discontinue his services. The Ninth Circuit reversed and relied on *Scheuer v. Rhodes,* 416 U.S. 232 (1974) an action against a state official, which laid to rest the idea that officials of the executive branch of Government were under an absolute blanket of immunity against suits for damages. The Supreme Court held that immunity is qualified and extends to officials in the performance of their official duties only if, (1) given the surrounding circumstances, there existed reasonable grounds for the belief that the action was appropriate and (2) they acted in good faith. The Ninth Circuit concluded that there is no reason to treat state and federal officials differently in respect of the sovereign immunity doctrine.

The SBA now contends that Glenn Penninger's acts were within the scope of his duties and that he acted in good faith. The acts complained of are covered in detail in the verified Complaint filed herein, and in the Affidavit of W. Earl Duncan (one of the plaintiffs) attached to plaintiffs' Motion for Preliminary Injunction and set forth in detail herein, *ante*. It is the petitioners' position that such acts were not in good faith and that Penninger as well as the other original defendants either arbitrarily, maliciously and intentionally or negligently refused to accept the cashier's checks previously set forth.

The holding of *Mark v. Groff, supra,* should be extended to authorize a preliminary injunction against Glenn Penninger – the S.B.A. employee in this case who accepted process by filing the Petition for Removal in this case.

See also *Rowley v. McMillan,* 502 F. 2d 1326 (4th Cir., 1974) where in answering this problem the court said at page 1331:

> A. The claim of immunity is based primarily upon the decision in *Barr v. Matteo*, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed. 2d 1434 (1959), with additional support in *Gregoire v. Biddle*, 177 F. 2d 579 (2 Cir. 1949) quoted and relied on in Barr); *Berndtson v. Lewis*, 465 F. 2d 706 (4 Cir. 1972); and *Galella v. Onassis*, 487 F. 2d 986 (2 Cir. 1973). Pertinent also to this contention is the recent Supreme Court case, decided since the argument of this appeal; *Scheuer v. Rhodes*, 416 U.S. 232 94 S.Ct. 1683, 40 L.Ed. 2d 90 (1974).
>
> Our reading of these cases persuades us that the doctrine of immunity, whatever its scope (a subject hereafter discussed), has no application to a suit for declaratory or injunctive relief, and, specifically, that it has no application to the aspect of the present litigation which resulted in the federal defendants, and others, being preliminary enjoined from future denials of the exercise by plaintiffs of their constitutional rights. Reference to Barr and to Scheuer is sufficient to prove the point.

and at page 1332:

> These two quotations demonstrate that the immunity rule, whatever its scope, is grounded upon the inhibitory effect of suits for money damages. Manifestly, actions for injunctive relief do not have that effect. The federal defendants have cited no case, and we have found none, which holds that the immunity doctrine insulates a public official or public employee from injunctive relief to prevent what would otherwise be an illegal act on his part.

This position is reinforced where there is no evidence in the record, either by Affidavit or testimony, that in fact the guarantor placed $60,000.00 up to cover any deficiency caused by Glenn Penninger as found by the trial court. The trial court's determination is at least in part erroneously based on evidence not in the record. The deficiency in this case is at least $26,000.00 as far as the Small Business Administration is concerned, and at least $26,000.00 as far as Advancement, Inc. is concerned. In fact, as of the date of this Petition for Certiorari, petitioners have not received any assurance that the government and Advancement, Inc. will not seek deficiency judgments against Auto Vac Company, Inc. Moreover, this Small Business Administration employee has caused plaintiffs to lose the right to have their corporation, i.e., Columbus Developers, Inc., proceed against property of the guarantor under any future default. See also *States Marine Lines, Inc. v. Shultz*, 498 F. 2d 1146 (4th Cir., 1974) and *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed 2d 90 (1974).

Petitioners' third contention is that this court's supervisory power should be exercised to correct manifestly unjust rulings of the District Court that the Administrator of the Small Business Administration was enjoined when the auction company was enjoined, and that the Administrator's property was enjoined.

The intervenor's position is that the temporary restraining order issued herein on the 29th day of January, 1976 was issued against the intervenor Small Business Administration because it was issued against Furrow Auction Company, a Tennessee Corporation; which was in the process of conducting a foreclosure sale on behalf of the intervenor, and because it was issued against one Glenn Penninger, an employee of the S.B.A. Moreover,

that said temporary restraining order is in violation of 15 U.S.C. § 634 (b) (1).

This intevenor's argument overlooks the crucial fact that the temporary restraining order was served only on Furrow Auction Company, and that that company acted in a dual capacity, i.e., as auctioneer for the Small Business Administration and as auctioneer for Advancement, Inc. – a North Carolina corporation. Therefore, assuming *arguendo* that the proposed intervenor's position is correct, this will not operate to dismiss the temporary restraining order entered against said Auction Company in its capacity as auctioneer.

Moreover, an injunction against the Furrow Auction Company does not come in the coverage of the statute, i.e., 15 U.S.C. § 634 (b) (1) in that that statute provides that

> but no . . . injunction . . . , mense or final, shall be issued against the Administration or his property.

While this protection may extend to an employee, i.e., an officer, the proposed intevenor has cited no case where the coverage extends to an independent contractor working for such agency pursuant to agreement, compare, e.g., that if some one at the auction negligently injured by an employee of the auction company, it is doubtful that the injured party could bring a claim against the government under the Federal Torts Claim Act, 28 U.S.C. § 1346 et. seq.

No where has the SBA cited a case to show that the plaintiffs enjoined the Administrator's property. It is elementary that the SBA had only the right to foreclose Auto-Vac's property upon Auto-Vac's default on the notes secured. An equitable lien, e.g., a mortgage or security agreement, is not an estate in land (or personal prop-

erty) and does not entitle the creditor to a conveyance of any interest in the land (or personal property), but is solely a charge on specific property declared by equity to provide a more effective method of enforcing an obligation, *Fulp v. Fulp*, 264 N.C. 20, 140 S.E. 2d 708 (1965).

CONCLUSION

For the reasons stated this Court should grant the petition for certiorari and hear the issues raised in this important area of dealing with the Federal government.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1550

W. EARL DUNCAN,
JAMES R. DUNCAN,
HOYT P. PIVER,
and AVERY A. PIVER

Appellants

v.

FURROW AUCTION COMPANY,
ADVANCEMENT, INC.,
GLENN PENNINGER, and
SMALL BUSINESS ADMINISTRATION

Appellees

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. F.T. Dupree, Jr., District Judge.

Argued February 16, 1977 Decided October 20, 1977

Before CRAVEN* and WIDENER, Circuit Judges, and COPENHAVER,** District Judge.

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*Judge Craven participated in the decision of this case but died before the opinion was prepared.

**United States District Court for the Southern Distirct of West Virginia, sitting by designation.

Ralph C. Jorgensen for Appellants; Joseph W. Dean, Assistant United States Attorney (Carl L. Tilghman, United States Attorney; Christine A. Witcover, Assistant United States Attorney, on brief) for Appellees.

WIDENER, Circuit Judge:

Plaintiff-appellants, Duncan, et al, owners of 80 percent of the capital stock of Auto Vac Company, Inc., brought this action in the North Carolina state courts to enjoin foreclosure sales under deeds of trust of Auto Vac's property by defendant-appellees, Glenn Penninger (an employee of the Small Business Administration), Advancement, Inc. (a note holder), and Furrow Auction Company (the auctioneer). Plaintiffs alleged that defendants, Advancement and Penninger, contrary to prior assurances, refused to accept plaintiffs' checks tendered in full payment of the indebtedness in exchange for an assignment of the deeds of trust.

The state court issued a temporary restraining order which plaintiffs served only on the Auction Company after the auction had been completed but before the property, or at least a part thereof, had been delivered to the purchaser. The Small Business Administration then intervened and Penninger removed the case to the federal court, where the district judge ordered the United States Marshal to seize such undelivered personal property.

At the conclusion of a hearing, the district court dissolved the TRO, dismissed the complaint against defendant Penninger and the SBA, denied the motion for a preliminary injunction and remanded the case to the state court.[1] Plaintiffs appeal.

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[1] No question is made with respect to remand, and we expect no opinion on it. For the proposition that when the claim

[footnote continued]

Because we find no difference in substance between this case and *Vincent v. Small Business Administration*, 402 F2d 769 (4th Cir. 1968), we affirm.

In *Vincent*, plaintiffs sought an injunction in the state court against a trustee from foreclosing a deed of trust securing notes held by the SBA. An amended complaint named the SBA and the United States as additional parties, who then removed the action to federal court after the state court granted the injunction. This court affirmed the district court's order which dissolved the injunction under 15 U.S.C. § 634(b)(1), which reads in pertinent part:

> ". . . [N]o attachment, injunction, garnishment or other similar process, mesne or final, shall be issued against the Administrator or his property; . . . ."

In the case now before us, the SBA's security instrument is not included in the record, but from its description in the notice of public foreclosure sale and the briefs, it appears to be a chattel mortgage or deed of trust filed by financing statements in the office of the Register of Deeds, Columbus County, North Carolina.

Two of the defendants are Furrow Auction Company, the "auctioneer hired by the SBA and by Advancement," and Glenn Penninger, "the agent, servant and/or employee of the SBA supervising the sale." We see no difference of legal effect here in a foreclosure of the SBA's chattel

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which is the basis for removal is dismissed, the district court has discretion to either retain jurisdiction and decide the case on the merits or to remand the case to the state court from whence it came, see *Watkins v. Grover*, 508 F.2d 920 (9th Cir. 1974), and *Murphy v. Kodz*, 351 F.2d 163 (9th Cir. 1965), both of which involved removal of the claim under 28 U.S.C. §1422 by a federal officer and the subsequent dismissal of the claim against the officer. See also Wright, Miller, and Cooper, *Federal Practice and Procedure*, §3739; Wright on *Federal Courts*, 3rd Ed. (1976), §41. For non-review of order of remand, see 28 U.S.C. §1447(d); Wright, Miller, and Cooper, §3740.

mortgage or deed of trust by the SBA's agents, and a foreclosure of the SBA's deed of trust by the trustee in *Vincent*.

Appellants argue that 15 U.S.C. § 634(b)(1) and (2) must be read together so that, in effect, the Administrator may be enjoined if he does not act reasonably in selling collateral which secures SBA notes.[2] We express no opinion on the correctness of plaintiffs proposed construction of the statute except to say that nothing required the Administrator to accept plaintiffs' offer to purchase the notes rather than to proceed with the foreclosure. Nothing indicates that this was unreasonable. Since there is nothing to show that the Administrator acted unreasonably, we will not speculate on what might be the result if he did.

Because we find 15 U.S.C. § 634(b)(1) prohibits an injunction, which was all the relief asked for, against the SBA, Furrow Auction Company as the agent of the SBA, and Glenn Penninger, we do not consider the other issues in this appeal.

The judgment of the district court is accordingly

AFFIRMED.

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[2] 15 U.S.C. § 634(b)(2) reads as follows:

[the Administrator may]

(2) under regulations prescribed by him, assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions and for such consideration as the Administrator shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in connection with the payment of loans granted under this chapter, and to collect or compromise all obligations assigned to or held by him and all legal or equitable rights accruing to him in connection with the payment of such loans until such time as such obligations may be referred to the Attorney General for suit or collection;"

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

[Filed NOV 15 1977]

No. 76-1550

W. EARL DUNCAN, et al

Appellants

v.

FURROW AUCTION COMPANY, et al

Appellees

ORDER

No judge entitled so to do has requested a poll of the court on the suggestion for rehearing en banc.

It is accordingly ADJUDGED and ORDERED that rehearing en banc shall be, and the same hereby is, denied.

The panel has considered the petition for rehearing and is of the opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

With the concurrence of Judge Copenhaver.

/s/ H. T. Widener

For the Court

APPENDIX B [Filed 2/27/76]

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

No. 76-0004-CIV-7

W. EARL DUNCAN, JAMES R. DUNCAN,
HOYT P. PIVER and AVERY A. PIVER,

Plaintiffs,

v.

FURROW AUCTION COMPANY
(A Tennessee Corporation),

ORDER

ADVANCEMENT, INC.
(A North Carolina Corporation),
GLENN PENNINGER,

Defendants,

SMALL BUSINESS ADMINISTRATION

Intervenor.

This case is before the Court on Intervenor Small Business Administration's Motion to Dissolve the Temporary Restraining Order and to dismiss the action and on plaintiffs' Motion for a Preliminary Injunction. On February 17, 1976 oral argument and legal memoranda were presented to this Court. After a careful consideration of all the documents filed in this case and argument of counsel, the Court finds the following:

On January 29, 1976 plaintiffs obtained a temporary restraining order in the Superior Court of Columbus

County against Furrow Auction Company, Advancement, Inc., and Glenn Penninger, an employee of Small Business Administration, preventing them from "transferring, selling, delivering and disposing" of the property of Auto-Vac Co., Inc. Auto-Vac's property was being sold for default on notes owing to Small Business Administration and Advancement, Inc., after the guarantor, not a party to this suit, put up $60,000.00 to cover any deficiency after the sale. Only an employee of Furrow Auction Company was served after the sale was over, on January 29, 1976. Thereafter, the case was removed to this Court on the motion of the defendant Glenn Penninger, and Small Business Administration moved to intervene, which was allowed. Simultaneously, Small Business Administration filed an Answer alleging that the complaint failed to state a claim for which relief could be granted, and moved to dismiss the claim as to it and its agents and to dissolve the temporary restraining order.

Title 15, U.S.C., Section 634(b)(1) states that no injunction shall be issued against the Administrator of Small Business Administration or his property. The plaintiffs argue that Furrow Auction Company was the person enjoined and thus not covered by the statute. However, this ignores the true state of affairs, as the property belonging to the Small Business Administration for purposes of the sale was affected by the temporary restraining order which prohibited the transfer of the sales property to the good-faith purchasers. Therefore, in this situation Furrow Auction Company was operating as an agent of Small Business Administration to conduct and complete the sales, and restraining them in effect restrained the Small Business Administration. See *Vincent v. Small Business Administration*, 402 F.2d 769 (4th Cir. 1968); *von Lusch v. Hoffmaster*, 253 F.Supp. 633 (D. Md. 1966). Since plaintiffs have only requested injunctive

relief, which cannot be granted, the complaint will be dismissed as to Small Business Administration and its agents.

It also appears that Advancement was never served and therefore cannot be bound by the restraining order.

Now therefore, it is ORDERED, ADJUDGED, and DECREED that the temporary restraining order be dissolved; that the complaint be dismissed as to defendants Glenn Penninger and Small Business Administration; that plaintiffs Motion for a Preliminary Injunction be denied, and that this action be remanded to the Superior Court of Columbus County for any further proceedings that may be deemed appropriate as to the remaining parties.

/s/F.T. Dupree, Jr.

F.T. DUPREE, JR.
United States District Judge

Dated:

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

W. EARL DUNCAN, JAMES
R. DUNCAN, Hoyt

W. EARL DUNCAN, JAMES
R. DUNCAN, HOYT P. PIVER
and AVERY A. PIVER,

Plaintiffs NO. 76-0004-CIV-7

VS.

FURROW AUCTION COMPANY,
ADVANCEMENT, INC.,
GLENN PENNINGER,

Defendants

SMALL BUSINESS
ADMINISTRATION,

Intervenor

ORDER

This action is now before the court on a motion filed on March 9, 1976 at 4:30 p.m. for an order staying the provisions of the previous order of 27 February 1976 dissolving a temporary restraining order, the motion being opposed by counsel for the government. As grounds for the motion the plaintiffs allege that they are in the process of appealing the order of February 27, 1976; that the defendants intend to distribute the items covered by the original temporary restraining order on or about the 10th of March, 1976; and "that it is necessary to maintain the status quo pending such appeal."

Rule 62(c) of the Federal Rules of Civil Procedure provides in part that when an appeal is taken from a final judgment dissolving an injunction the court in its discretion may restore or grant an injunction "during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." It is apparent that if the court should stay its previous order dissolving the temporary restraining order the effect would be to continue the restraining order in full force and effect. In order to warrant such action the court of necessity would have to make findings inconsistent with those on the basis of which the temporary restraining order was dissolved. More specifically, the court would have to find that the plaintiffs will sustain irreparable loss; that there is no adequate remedy at law; that there is likelihood of success by the plaintiffs on appeal; and that to allow the stay will not be contrary to the public interest. The court is unable to make these findings in the case at bar but rather is of opinion that the plaintiffs are unable to show that they will sustain irreparable harm if the stay is not granted; that any loss which the plaintiffs may be able to show is measurable in damages and that the defendant, Small Business Administration, is amply solvent to respond in damages; that in view of the specific terms of the statute, 15 U.S.C. § 634(b)(1), which precludes the issuance of an injunction against the Administrator of the Small Business Administration or his property, the plaintiffs are unable to make the required "strong showing" that they are likely to succeed on the merits on appeal; and that other parties to the litigation and the purchasers at the foreclosure sale will be substantially harmed by the requested stay which is not in the public interest. Accordingly, it is now in the discretion of the court

ORDERED that the motion of the plaintiffs to stay the order of 27 February 1976 dissolving the temporary restraining order be and the same is hereby denied.

/s/F.T. Dupree, Jr.

F.T. DUPREE, JR.
UNITED STATES DISTRICT JUDGE

March 10, 1976.

Supreme Court, U. S.
FILED
APR 20 1978
MICHAEL RODAK, JR., CLERK

No. 77-1144

In the Supreme Court of the United States

OCTOBER TERM, 1977

W. EARL DUNCAN, ET AL., PETITIONERS

v.

FURROW AUCTION COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1144

W. EARL DUNCAN, ET AL., PETITIONERS

v.

FURROW AUCTION COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners, four persons operating as a group called Columbus Developers, Inc., seek review of the court of appeals' determination that 15 U.S.C. 634(b)(1)[1] prohibits issuance of an injunction against the Administrator of the Small Business Administration and his agents.

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[1] 15 U.S.C. 634(b) provides in pertinent part:

> (b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may—
>
> (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property;
>
> (2) under regulations prescribed by him, assign or sell at public or private sale, or otherwise dispose of for cash or credit, in his discretion and upon such terms and conditions

1. Petitioners own 80 percent of the capital stock of the Auto Vac Company. The assets of Auto Vac were pledged under deeds of trust to secure promissory notes that Auto Vac had given to SBA and another lender, Advancement, Inc. When Auto Vac defaulted on the notes, SBA and Advancement exercised their rights under the deeds of trust and scheduled an auction to sell the assets. The auction was to be conducted by Furrow Auction Company. On the morning scheduled for the auction petitioners offered respondent Glenn Penninger (an employee of the SBA) a check in the amount of Auto Vac's full outstanding debt to SBA and Advancement; petitioners requested, in exchange, an assignment to them of Auto Vac's notes and the deeds of trust. Penninger refused the offer. (Petitioners claim that Penninger previously had assured them that their payment would be accepted.) See Pet. 4-5; Pet. App. 2a.

Petitioners then sought and obtained from a North Carolina state court a temporary restraining order against the foreclosure sales. SBA intervened and then, on Penninger's motion, the case was removed to the United States District Court. After a hearing, the district court dissolved the temporary restraining order, dismissed the complaint against Penninger and the SBA, denied a motion for a preliminary injunction, and remanded the

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and for such consideration as the Administrator shall determine to be reasonable, any evidence of debt, contract, claim, personal property, or security assigned to or held by him in connection with the payment of loans granted under this chapter, and to collect or compromise all obligations assigned to or held by him and all legal or equitable rights accruing to him in connection with the payment of such loans until such time as such obligations may be referred to the Attorney General for suit or collection;

* * * * *

case to the state court (Pet. App. 2a).[2] The court of appeals affirmed, holding that 15 U.S.C. 634(b)(1) prohibits injunctive relief restraining the Administrator of SBA and his agents from foreclosing on SBA's security interests (Pet. App. 1a-4a).

2. This case is moot. The court of appeals did not stay the district court's dissolution of the restraining order and its denial of injunctive relief, and the sale of the property has occurred and the property has been delivered to the purchasers. It is no longer possible to afford petitioners the relief they seek.

In any event, petitioners' arguments are insubstantial. The court of appeals correctly held that any injunction against the auction was barred by 15 U.S.C. 634(b)(1). That statute provides that "no * * * injunction * * * or other similar process * * * shall be issued against the Administrator or his property," and the courts have uniformly held that that provision prohibits injunctions against the Administrator and his agents "[i]n the performance of, and with respect to, the functions, powers, and duties vested in [the Administrator] * * *." See, *e.g.*, *Romeo* v. *United States*, 462 F. 2d 1036, 1038 (C.A. 5), certiorari denied, 410 U.S. 928; *Vincent* v. *Small Business Administration*, 402 F. 2d 769 (C.A. 4); *United States* v. *Mel's Lockers, Inc.*, 346 F. 2d 168 (C.A. 10). As the foregoing cases establish, Section 634(b)(1) prohibits injunctive relief whether or not the claim is that the claim is that the Administrator or his agents unreasonably refused to assign notes or security interests.[3] Petitioners may or may not have a cause of action for

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[2]The state court injunction against Advancement, Inc. was defective for inadequate service of process (Pet. 6; Pet. App. 8a), and the petition therefore does not involve any issue respecting petitioners' rights against Advancement.

[3]As the court of appeals noted (Pet. App. 4a), however, there is nothing to indicate that Penninger's refusal of petitioners' offer to

damages for any unreasonable conduct in violation of Section 634(b)(2), but they have no cause of action for injunctive relief, which was the only relief sought in petitioners' complaint (Pet. 4-5).[4]

Scheuer v. *Rhodes*, 416 U.S. 232, and other cases involving official immunity from damage actions relied on by petitioners (Pet. 13-16), have no bearing on this case. This case involves a suit for injunctive relief that is expressly barred by statute.[5] Moreover, there is no basis for any claim that SBA or its agents were not acting in "the performance of, and with respect to, the functions, powers, and duties vested in [the Administrator] * * *" within the meaning of Section 634(b)(1).

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purchase the notes on the morning of the auction was unreasonable. Petitioners tendered the check (five minutes before the auction) in their individual capacities rather than on behalf of Auto Vac, and they sought assignment of deeds of trust secured not only by the assets of Abto Vac that were to be sold at the auction but also by the farm of another person. The holding of the auction in no way injured any legitimate interests of petitioners in having Auto Vac's debt discharged and their own property interests protected, because they were free to bid at the auction, and in fact they purchased some of the property sold.

[4]*Capital Refrigeration, Inc.* v. *United States*, 375 F. Supp. 462 (M.D. Pa.), cited by petitioners (Pet. 12), dismissed a suit against SBA and did not hold that equitable relief would ever be available.

[5]It is therefore not necessary to defer consideration of the petition pending the disposition of *Butz* v. *Economou*, No. 76-709, argued November 7, 1977, which presents questions concerning the scope of immunity for federal officials from damage claims in the absence of an explicit statute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

Supreme Court, U. S.
FILED
MAY 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1144

W. EARL DUNCAN, *et al.*,

Petitioners,

v.

FURROW AUCTION COMPANY, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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IN THE

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W. EARL DUNCAN, *et al.*,

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ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

Petitioners for reply to the government's Memorandum in Opposition state as follows:

1. That in the cases cited by the government the contention was not made as it is in the instant case that the two subsections of 15 U.S.C. 634(b) must be read together, i.e., that the duty rests on the Administrator to act *reasonably* in selling or assigning any security assigned to him in connection with the payment of loans granted

under the act (subsection (b)(2)), and that in the absence of such reasonable actions the Administrator may be enjoined.

2. That such result is recognized in other Federal Statutes where in injunction is prohibited. Compare, *Enochs v. Williams Packing and Navigation Co.*, 370 U.S. 1, 8 L.Ed.2d 292, 82 S.Ct. 1125 (1962) wherein this Court construed the following statute as it read at the time:

Section 7421(a) of the Internal Revenue Service Code of 1954, 26 U.S.C. §7421(a), before the latest Amendments which read:

> Except as provided in Sections 6212(a) and (c), and 6213(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

The exceptions of the statute related to proceedings before the United States Tax Court which were not applicable in the *Enochs*, case because the claim in *Enochs* was for overassessment of social security and unemployment taxes which were not in the Tax Court's jurisdiction. In *Enochs* this Court, although holding that the government's claim was not without foundation on the facts, said as follows at 370 U.S. 7:

> The manifest purpose of §7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund. In this manner the United States is assured of prompt collection of its lawful revenue, *Nevertheless, if it is clear that under no circumstances could the Government ultimately prevail, the central purpose of the act is inapplicable and, under the Nut Margarine Case, the attempted collection may be enjoined if equity jurisdiction otherwise exists. In such a situation the extraction is merely in the guise of a tax.* [Emphasis supplied]

Compare, *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498, 76 L.Ed. 422, 52 S.Ct. 260.

3. This case is not moot as pointed out on page 16 of Petitioners' Petition for a Writ of Certiorari filed herein because the petitioners have not received any assurance that the government and Advancement, Inc. will not seek deficiency judgments against Auto Vac Company, Inc. The deficiencies involved in this case are at least $26,000.00 as far as the Small Business Administration is concerned, and at least $26,000.00 as far as Advancement, Inc. is concerned.

It is, therefore, respectfully submitted that this Court should grant the petition for certiorari and hear the issues raised in this important question involved in the administration of the loan provisions supervised by the Small Business Administration.

Respectfully submitted,

RALPH G. JORGENSEN
Post Office Box 248
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Attorney for the Petitioners.